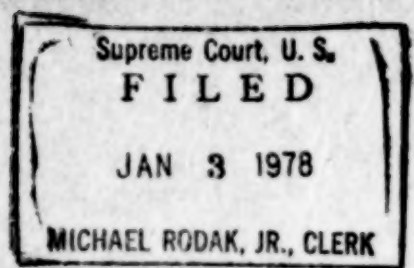


77-816



**IN THE SUPREME COURT OF THE
UNITED STATES**

DECEMBER TERM, 1977

MICHAEL DRIELICK,
Petitioner,

v.

No. A-333

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

**ANSWER TO PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
MICHIGAN**

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QUESTION INVOLVED

- I. DOES THE FOURTH AMENDMENT PROHIBIT THE INTRODUCTION OF A TAPE-RECORDED CONVERSATION INTO EVIDENCE WHEN ONE PARTY TO THE CONVERSATION, WHO WAS A WITNESS AT THE TRIAL, CONSENTED TO THE MONITORING?

The Plaintiff-Appellee answers "NO".

COUNTER-STATEMENT OF FACTS

The People accept the Statement of Facts recited in Appellant-defendant's Brief but would supplement them with these relevant facts:

1. Prior to the telephone conversation of November, 28, 1972, Appellant-defendant told Nancy McNeil that he killed her husband, Daniel Drielick. (T. p. 277)
2. At this time, witness Nancy McNeil said she was going to turn the Defendant into the police for murder. (T. p. 280)

ARGUMENT

I. THE FOURTH AMENDMENT DOES NOT PROHIBIT THE INTRODUCTION OF A TAPE-RECORDED CONVERSATION INTO EVIDENCE WHEN ONE PARTY TO THE CONVERSATION, WHO WAS A WITNESS AT THE TRIAL, CONSENTED TO THE MONITORING.

In the early morning of November 13, 1972, the body of Daniel McNeil was discovered in the rear seat of his automobile which was parked in front of his parents' home in Saginaw. The victim was killed at close range by a .16 gauge shotgun. (T. p. 157) During the investigation of this homicide, Nancy McNeil, wife of the deceased, went to the Buena Vista Police Station to talk with Detective William Brown. At this time, she told the detective that her lover, Michael Drielick, had admitted to her that he had killed her husband. The detective asked Mrs. McNeil if she would call the Defendant and permit the detective to listen to the conversation and record this conversation for future use. Mrs. McNeil permitted the detective to so listen and record. The date of this telephone conversation was November 28, 1972. At the trial, Mrs. Nancy McNeil testified to this telephone conversation. (T. pp. 301-304, 382-385), and in corroboration of her testimony the tape was played to the jury in open court. (T. pp. 387-398; see Appendix, 1b-8b) The People assert that the monitoring of this telephone conversation is not in contravention of Appellant's constitutional rights to privacy. Furthermore, as the People will demonstrate the factual framework of this case is readily distinguishable from *People v Beavers*, 393 Mich 554 (1975); nor do the facts of this case conjure the "ominous spectre of the Orwellian Big Brother" which this Court sought to prevent in *Beavers*, at p. 563.

A. The Federal Case Law And Statutory Provisions Permit A Third Party To Monitor Conversations When Such Conversations Have Been Consented To By At Least One Participant Of The Conversation.

The monitoring of conversations is, of course, an issue which has been analyzed by this Court and the United States Supreme Court in terms of the Fourth Amendment. These constitutional provisions provide for the protection of personal privacy of an individual. Without question the Fourth Amendment applies to words as well as more common tangible items. *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). Furthermore, this protection of privacy includes protection against surreptitious surveillance of a private conversation by an outsider. *Silverman v United States*, 365 US 505; 81 S Ct 679; 5 L Ed 2d 734 (1961). This protection is not, however, absolute. The Congress has created statutory guidelines for electronic monitoring.

The federal rules concerning telephone monitoring are provided in the Federal Communications Act of 1934. 47 USC 605. The federal rule renders inadmissible in federal court evidence obtained by wiretapping. This ruling also applies to the States. *Lee v Florida*, 392 US 378; 88 S Ct 2096; 20 L Ed 2d 1166 (1968). However, the federal courts had sought to avoid the harsh results of this section:

“... the trend in recent years appears to be toward avoiding the application of this rule by finding that under the specific circumstances present in cases under consideration no ‘interception’ occurred, or that such interception was consented to, thus taking it out of §605.” Annot, 20 L Ed 2d 1718, 1725 (1969).

At the same time, the Congress amended the Act of 1934 to avoid its unjust results. Under the Omnibus Crime Con-

trol and Safe Streets Act of 1968 a law enforcement official is allowed to intercept wire and oral communications where such officer is a party to the conversation or where one of the parties to the conversation has given prior consent to such interception. 18 USC 2511 (c) (1970). Interception, whether by wiretapping or recording from an extension telephone, or by any means where done with consent of one of the parties is not subject to prior judicial approval, i.e. no warrant is required for such surveillance and interception. This legislative amendment is consistent with the recommendations of the American Bar Association Standards of Criminal Justice, Electronic Surveillance:

“4.1 Overhearing or recording.

The use of electronic surveillance techniques by law enforcement officers for the overhearing or recording of wire or oral communications with the consent of one of the parties should be permitted.

4.2 Authenticity.

The techniques should be so employed by law enforcement officers that the recording will be insofar as practicable complete, accurate and intelligible.”

Thus, both the federal standards and those standards recommended by the American Bar Association distinguish those situations wherein one party consents from the unconsented to, “uninvited”, ear of a third party.

There is no “interception” for the purpose of the exclusionary rule when consent has been received. *Rathbun v United States*, 355 US 107 (1957); see generally Annot 9 ALR3d 423 (1966). Distinguishing “eavesdropping” from the consensual monitoring, the Court explained in *Lopez v United States*, 373 US 427; 82 S Ct 1381; 10 L Ed 2d 462 (1963):

“Indeed, this case involves no ‘eavesdropping’ whatever in any proper sense of that term. The govern-

ment did not use an electronic device to listen in on conversations it could not have otherwise heard. Instead, the device was used to obtain the most reliable evidence possible of a conversation in which the government's own agent was a participant and which that agent was fully entitled to disclose."

A similar ruling was announced in *Hoffa v United States*, 385 US 293; 87 S Ct 408; 17 L Ed 2d 374 (1966).

In *Hoffa*, a union associate named Edward Partin, went to Nashville to discuss union business. While there, Partin, who made reports to a federal agent and was compensated for these services, overheard discussion of attempts to bribe jurors in a trial pending against Hoffa, and testified in a later trial to these conversations. Ruling Partin's testimony admissible, the Court noted Partin did not obtain this knowledge surreptitiously nor by stealth, but rather was at the hotel by invitation. Specifically, the Court observed:

"Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrong-doer's misplaced belief that a person to whom he voluntarily confides his wrong-doing will not reveal it."

In more a *priori* remarks on the Fourth Amendment the Court noted:

"Where the argument falls is in its misapprehension of the fundamental nature and scope of Fourth Amendment protection. What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. There he is protected from unwarranted governmental intrusion. And when he put something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable

seizure. So it was that the Fourth Amendment could not tolerate the warrantless search of the hotel room in *Jeffers*, the purloining of the petitioner's private papers in *Gould*, or the surreptitious electronic surveillance in *Silverman*." At p. 301.

A striking analogy appears between the facts of *Hoffa* and the case at bar, i.e. both cases involve testimony of a former associate, a relationship that existed prior to the involvement of the police agencies. Both cases involve consent of one party to disclose the information of the communications with the defendant. *Hoffa* and *Lopez* are consonant with an earlier ruling of the Court wherein the Court allowed a third party to testify to communications heard between an informant and a defendant. *On Lee v United States*, 343 US 747; 74 S Ct 389; 96 L Ed 1270 (1952).

In *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967), the United States Supreme Court juxtaposed property rights and the Fourth Amendment. This decision eliminated the concept of trespass to determine whether there has been a constitutional violation. The decision in *Katz* was that the defendant had a "reasonable expectation of privacy" in a public telephone booth and that the electronic monitoring of the conversation — without the consent of any of the parties — was a violation of defendant's Fourth Amendment right to privacy. Citing with approval *Lewis v United States*, 385 US 206; 87 S Ct 424; 17 L Ed 2d 312 (1967), the Court stated:

"What a person knowingly exposes to the public, even in his own home or the office, is not a subject of Fourth Amendment protection." At p. 511.

Although defense counsel would assert that *Katz* forbids any form of monitoring, including consent monitoring, Mr. Justice White's concurring opinion recognizes the exception:

"When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. . . . It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording or transmitting to another." At p. 363 (1967).

In *White v United States*, 401 US 475; 91 S Ct 1122; 28 L Ed 2d 453 (1971) the United States Supreme Court reaffirmed the pronouncements of *On Lee* and ruled that no Fourth Amendment violation occurred when conversations between a government informant and the defendant were recorded. More importantly, the Court noted that *Katz* did not overrule *On Lee*:

"We see no indication in *Katz* that the Court meant to disturb that understanding of the Fourth Amendment or to disturb the result reached in the *On Lee* case, nor are we now inclined to overturn this view of the Fourth Amendment." At p. 1125.

Besides depending upon the past Court decisions of *Hoffa*, *Lopez* and *On Lee*, the Court noted that "constitutional barriers to relevant and probative evidence which is also accurate and reliable" should not be raised. Indeed, this policy determination of the truth-seeking function of the jury system is the primary policy factors of the American Bar recommendations (Minimum Standards, pp. 125-127)

Although Appellant-defendant intimates an apparent disparity between *On Lee* and its progeny and *Katz* and its progeny, the federal circuits have not been so bothered. In *United States v Jackson*, 390 F2d 317 (2nd Cir, 1968), the Court admitted into evidence the taped telephonic transactions of the federal undercover agent. In that ruling the Court reaffirmed *On Lee*:

"In reliance on the dissents in *On Lee* . . . and *Lopez* . . . and the concurrence in *Warden Md Penitentiary v Hayden*, 387 US 294, 310-312, 87 S Ct 1642, 18 L Ed 2d 782 (1967), and similar 'nosecounting', counsel asks us to say that *On Lee* is no longer law. The Supreme Court, however, has not so held, and we decline to anticipate it might."

The Ninth Circuit has reached a similar result. In *Holmes v Burr*, 486 F2d 55 (9th Cir, 1973) (cited with approval Ringel, Searches and Seizures, Arrests and Confessions (1974 Cum Supp)), the Court ruled where one party consents to the communication, such conversation is admissible. Similar results can be found in other federal circuits. *United States v DeVore*, 423 F2d 1069 (4th Cir, 1969); *Dancy v United States*, 390 F2d 370 (5th Cir, 1968); *United States v Gardner*, 416 F2d 879 (6th Cir, 1969); *United States v Hickman*, 426 F2d 515 (7th Cir, 1970); *United States v Pucki*, 441 F2d 697 (9th Cir, 1970), cert denied 404 US 853; 92 S Ct 92; 30 L Ed 2d 92 (1971); *Holt v United States*, 404 F2d 914 (10th Cir, 1968), cert denied 393 US 1067; 89 S Ct 872; 21 L Ed 799 (1969).

Thus a survey of the federal case law and statutory provisions demonstrate a clearly delineated framework whereby the actions of the government are said to interfere with one's privacy and those areas where no privacy can be claimed for the purpose of the exclusionary. Appellant's analysis of the federal case law is, unfortunately, not so well-defined. The issue before this Court — the only issue — is whether one party's consent is sufficient to avoid an illegal seizure. *This case does not involve unconsented to seizure as emphasized in Appellant's Brief, i.e. Katz v United States and Berger v New York.*

A thorough examination of the federal cases, statutes and the American Bar Association Minimum Standards reflects an acceptance of the need and justification for consented to monitorings.

B. The Jurisdictions Which Have Been Presented Analogous Facts Agree That Such Consented To Monitorings Is Not An Unlawful Seizure For The Purposes Of The Fourth Amendment.

The issue of whether a tape recording of a monitored telephone conversation in which one party consented to the evidence has been raised in other jurisdictions. In the absence of some statutory provisions to the contrary, the trend would appear to be to allow the introduction of such recording as a corroborating form of evidence, even notwithstanding *Katz v United States, supra*. In *People v Gibson*, 246 NE2d 349 (NY, 1969), the appellate bench was requested to rule upon the constitutionality of a state statute which authorized monitoring of a conversation when at least one party consented in light of *Katz*. This line of reasoning was tersely discounted:

“Appellants say, however, that the teaching of these cases has been made obsolete by *Katz v United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576, which held that the interception of a private telephone conversation by attaching an electronic device on the outside of a public telephone booth used by one of the parties to the conversation was a violation of Fourth Amendment rights.

But that case seems readily distinguishable. A man who buys telephone service in a public booth buys private telephone service. That the booth is available to public use by anyone willing to pay for it does not make the private conversation public; and all the basic reasons which protect a person's privacy on a telephone he hires by the month apply to the phone which is his exclusive instrument while he pays for it. Such an interception would, for example, readily come within the New York Penal Law's interdiction against eavesdropping.

But it has no relevancy to a voluntary disclosure of the conversation by a party to it, with or without the aid of recording or transmitting techniques. Such a disclosure seems governed by *On Lee, Lopez*, and cases which followed them.”

The Illinois Courts have also grappled with the problem. In Illinois eavesdropping is unlawful unless there is consent of any one party and at the request of the State's Attorney. Ill Rev Stat 1969, ch 38, §14-2. A defendant challenged the constitutionality of the statute. *People v Holliman*, 316 NE2d 812 (Ill, 1974). Not only did the Court rule that this statute was constitutional, but also ruled that there was no inconsistency in the rulings of *Katz, supra* and *White, supra*. *People v Holliman*, p 816. In that same year the Illinois Court heard a similar issue in *People v Drish*, 321 NE2d 179 (Ill, 1974). Using *Katz* as an analytical tool, the Court reached the same decision as before. The Court noted looking to the facts of the case, that there had been no prolonged police surveillance, nor had the police agencies used the monitoring as a form of fishing expedition.

In *State v Roy*, 510 P2d 1066, 1068 (Haw, 1973), the Hawaiian high court cited *White, supra*, as precedent when it ruled that the expectation that a person with whom the defendant is talking will not later reveal the conversation to the police nor protected by the Fourth Amendment. The Hawaiian constitutional analogue to the Fourth Amendment prohibits “invasions of privacy”; however, in *Roy*, the Court ruled that such monitoring was not protected under either Federal or State Constitutions. The same result was reached by the Arkansas Supreme Court in *Kerr v State*, 512 SW2d 13 (Ark, 1974). The Kansas high court ruled where one party has consented to the conversation, be he an agent of the police or otherwise, such tape recording is admissible. *State v Stokes*, 523 P2d 364, 371 (Kan,

1974). The State of Georgia has made similar rulings. *Cross v State*, 198 SE2d 338, 340 (1973).

A Florida constitutional provision states:

“§12. Searches and Seizures. — The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.” (Emphasis added).

Even with the wording of this constitutional provision, the Florida Supreme Court has ruled that where a participant to the conversation takes the stand and testifies that consent was given the recording can be introduced into evidence. *Tollett v State*, 272 So 2d 490, 494 (Fla, 1973).

Thus, an analysis of other state courts demonstrates that the better reasoned approach to the fact situation is to permit the use of recorded conversations into evidence when one of the parties to the conversation has consented. Although the People recognize these decisions are in no way binding to this Court, the People believe that such an illustration of other court rulings provide some point of reference for the purpose of deciding this issue.

C. The Law In The State Of Michigan, Prior To *Beavers* Permits The Use Of A Tape-recorded Device When One Party Consents To Such Monitoring.

Prior to the Circuit Court's ruling on the admission of the tape-recorded conversation into evidence, where one

party has consented to the monitoring, the Michigan Court of Appeals had ruled said monitoring was constitutional. In *People v Bruno*, 30 Mich App 375, 382 (1971), the defendant contended that his Fourth Amendment rights were violated by the introduction into evidence of a tape recording of a telephone conversation between the victim and the party who hired the defendant. This recording was made with the consent of the victim. Citing *Rathbun v United States*, *supra*, the Court affirmed the conviction stating consent by a party is sufficient. *Bruno* was cited several months later in *People v Karella*, 35 Mich App 541, 545 (1971) and was bolstered with the then newly reported opinion of *White v United States*. In *People v Patrick*, 46 Mich App 678, 684 (1973), the Court rejected defendant's reliance upon *Katz* and ruled:

“The requirement of a judicial order is not necessary where one party to the conversation consents to the interception of the conversation by police authorities, their agents, or the use of electronic equipment.” (Citing *White*)

When no parties have consented to electronic monitoring, and the police eavesdrop, the Michigan Appellate Court has ruled this form of eavesdropping to be unlawful and not to be admitted into evidence. *People v Tebo*, 37 Mich App 141 (1971). However, no consent was involved in this case, but rather the People argued that the regularly employed police procedure of listening to all prisoners' calls without the consent of anyone to prevent the county from being charged for a long distance phone call was not sufficiently important to allow the police to eavesdrop. Indeed, other means could have been employed to protect this interest in limiting expenses.

The importance of these past cases not only illustrates the jurisprudential analysis provided at the Appellate Court level but also illustrates the general reliance on the

rule which permitted the introduction of a taped conversation into evidence when one party consents to that conversation. *Linkletter v Walker*, 381 US 618; 85 S Ct 1731; 14 L Ed 2d 601 (1965).

In *People v Livingston*, 64 Mich App 247 (1975), decided eleven days before *People v Plamondon*, 64 Mich App 413 (1975), the Court of Appeals noted where neither party has consented, it does not follow that such recording be excluded from the jury:

"Of the initial tape recordings made by Mr. Morgan, two things are clear; neither party to the conversation consented to his intervention and there was absolutely no police involvement. It thus appears that Mr. Morgan's interception of the first calls was in violation of MCLA 750.539c; MSA 28.807(3). However, statutory violations do not call into play the per se exclusionary rule applicable to constitutionally defective searches and seizures. *People v Burdo*, 56 Mich App 48; 223 NW2d 358 (1974). The Court in *Burdo* recognized the issue as one of public policy and concluded that suppression was not necessary to protect the basic rights of the defendant. The Court also noted the potential civil liability for the statutory violation. See also *People v Mordell*, 55 Mich App 462; 223 NW2d 10 (1974).

The evidence initially gathered by Mr. Morgan in violation of the statute need not be suppressed. The Legislature provided for criminal sanctions against the interceptor and created civil liability for actual and punitive damages. MCLA 750.539h (b) and (c); MSA 28.807(8)(b) and (c). The Legislature did not enact an exclusionary rule. We will not judicially create a remedy that the Legislature chose not to create." At p. 255.

The Court further noted that in the absence of a statutory prohibition, or constitutional objection, such seizure of the

conversation by the police, with the consent of one of the parties to the information, was valid.

In a counter case, *People v Plamondon*, a rationale which, for the most part, is paraphrased by Appellant-defendant herein, the Appellate Court reached an opposite result. Since this case is presently before the Court, little need be said. That case not only failed to discuss the statutory authority for the action of the police but also failed to recognize the federal provisions which clearly admit consented to monitorings.

D. When All Factors Are Balanced, The Jury Has A Right To Listen To The Monitored Conversation To Which One Party Consented.

As with all constitutional issues, this Court must balance the countervailing interests and strike the proper medium which is consistent with the spirit and purpose of the constitution. Of course, the spirit of the Fourth Amendment is rooted in the fundamental ideas of privacy of the citizen from an unjustified invasion by the State. When one party consents to permit monitoring of a conversation, it cannot be said that there was an *unjustifiable intrusion*. Once consent has been obtained, the State cannot be said to *intrude*.

The factual framework of this case does not suggest the Police State mentality which apparently disturbed the Court in *Beavers*. Indeed, this case is readily distinguishable from *Beavers*. Unlike *Beavers*, the relationship between the defendant and the witness, who consented to the monitoring, was not an artificial one, i.e. not one designed to exploit a criminal situation. This case does not involve the cultivation of a limited relationship for a limited purpose. Analyzing the roles of an undercover agent and privacy, one law review commentator noted:

"Deception involved in undercover investigations often infringes on the privacy of those subjected to the investigation and of others who may come into contact with the investigator. A comprehensive definition of privacy is beyond the scope of this article, but it clearly encompasses the interest in being aware of all relevant characteristics of persons with whom one deals. Thus, any contact between an undercover investigator and another person who is unaware of the investigator's official capacity to some extent involves an infringement of this interest. For example, if the subject unwittingly permits observations of himself because of the deception, the subject's interest in personal privacy has been infringed. The impact of undercover investigations on personal privacy may be also extended beyond the privacy of those actually subjected to such investigations. If the use of undercover investigations causes persons to fear becoming the subjects of such investigations, those persons' privacy interests have also been infringed. . . .

A related but distinguishable interest is that of privacy in interpersonal relations. A person has an interest in knowing all relevant characteristics of those with whom he forms any personal relationship and of those to whom he discloses information concerning relationships with others. When undercover investigators enter into personal relationships with subjects unaware of their official capacity and covertly obtain information concerning the subject's relationship with others, they infringe on the interest in interpersonal relations. Of course, the impact can be more serious. To the extent that awareness of undercover investigations causes persons not to form personal relationships that they would otherwise form, the interest has been infringed in a more significant manner. Again, the effect may be indirect. Even persons not themselves the subject of such investigations may be affected by awareness that such investigations occur and the possibility that they may be subjected to one.

If the interpersonal relationship is also a professional one, the investigation becomes more serious. Use of physicians as undercover investigators, for example, may discourage the formation or continuation of a physician-patient relationship. In view of the value of those relationships, their infringement would appear more objectionable than the transgression of a nonprofessional friendship." Dix, *Undercover Investigations and Police Rulemaking*, 53 Texas L Rev 203, 211 (1975).

On the other hand, the interest in judicial integrity must be weighed. Participant monitoring has a two-fold function: not only to develop incriminating evidence which is not convincing and not subject to attack, but more importantly, to prevent the official integrity of the consenting party by untoward behavior. All parties have an interest in a fair trial. A fair trial means, at the minimum, that the jury will hear all relevant and accurate testimony. All parties are concerned about the integrity of the evidence produced. In its commentary on the Standards of Electronic Surveillance the Commentator stressed the need for integrity of evidence:

"No man knows better, however, the fallibility of human testimony than that man who is trained in the law. The prospect that science through electronic surveillance techniques can provide us with evidence not subject to the frailties of human nature ought, therefore, to be applauded. The use of such techniques in this area, in short, should be encouraged, not discouraged, and they should not be encumbered with administrative procedure. Where trained investigators are conducting routine interviews, reliance may properly be placed in the agents' memories aided by notes taken contemporaneously. See *Campbell v United States*, 373 U.S. 487 (1963). But where informants, whose credibility may be suspect, are used, see e.g. *Osborn v United States*, 385 U.S. 323 (1966), where victims of crimes

are engaged in key conversations with the perpetrators themselves, see e.g. *Rathbun v United States*, 355 U.S. 107 (1957), or where the investigators as such are individually involved and their credibility will be a significant factor in the subsequent trial, see e.g. *Lopez v United States*, 373 U.S. 427 (1963), every effort should be made to record the conversations through the best available means. For a recording will reproduce the very words spoken with all the added significance that comes from inflection, emphasis and the other aspects of oral speech. See *State v Reyes*, 209 Ore. 595, 308 P.2d. 182 (1957)."

There would appear to be no dispute over whether Nancy McNeil could testify to the content of her conversation with Michael Drielick. Although Appellant-defendant stresses the confidential nature of the conversation, it is not claimed that the testimony is privileged testimony. MCLA 600.2162; MSA 27A.2162. The policy considerations of the privilege are as narrow as the privilege itself, i.e. the encouragement of marital confidences and the recognition of the delicacy of the relationship. *McCormick, Evidence*, §86, p 172 (2nd ed); see also Federal Rule of Evidence 505. Thus, the statute does not recognize the "intimate relationship" argued by Appellant-defendant; nor can any policy consideration be mustered to prohibit the testimony of Nancy McNeil's conversation with Michael Drielick. Although Appellant-defendant tries to assert his right of privacy, one cannot forget the Defendant admitted killing Daniel McNeil, Nancy's husband.

Appellant-defendant obfuscates the issue of consent by discussing the concept of "joint property" rights. (In light of the rationale in *Katz*, a case heavily relied upon by Appellant, it would appear to be, at the minimum, an inappropriate analogy). However, once one recognizes that Nancy McNeil had a right to testify about the content of the con-

versation, it follows that whatever one names this "interest in the conversation", she would have an equal interest to share the conversation with whomever she pleases. In the absence of a privilege which would prevent the witness from granting an "audience" to the conversation, it follows that the witness' right to control the information gained through word-of-mouth, is equal to that of the defendant. Nancy McNeil had a right to control what facts were gained through the conversation. Since the Supreme Court in *People v Chism*, 390 Mich App 136 (1973), affirmed the consent search of the wife to her husband's property stating that the defendant "assumed the risk", it would appear that Judge Allen misinterpreted the thrust of this Court's ruling, and, clearly misapplied that case to the situation of telephone monitoring. *People v Plamondon*, 64 Mich App 413 (1975).

Once one recognizes the distinction between this case and that of undercover monitoring, the policy issues of a fair trial and lack of privilege clearly outweigh those arguments raised by Appellant. There was no illusion of a relationship that did not exist, there was no continual surveillance by the police in an effort to control the situation. On the other hand, there is no denial that Nancy McNeil had the right to testify and to reveal to the world everything conveyed to her by Appellant. In an effort to present a fair trial, the People should have the right to present the most accurate evidence.

In conclusion, the People urge this Court to scrutinize not only the facts before this Bench, but also the factors which this high Court has focused on in determining whether a defendant's rights have been violated. The "expectation of privacy" focused upon in *Katz* is not of the same quality as here. Indeed, the Michigan Supreme Court wrongfully applied that test in its earlier decision of *Beavers*. Furthermore, the Michigan Court too quickly counted

votes, so to speak, in *White*, without analyzing the Justices' rationale. If the separate opinions in *White* are properly aligned, the majority of this Court has ruled that prior judicial approval is a prerequisite where one party consents. To that extent, the rationale of *People v Drielick*, 400 Mich 599 (1977), is improper (although the conviction was affirmed). Whether *White* was pre-*Katz* or not is irrelevant. The true significance in *Katz* is that it rejected the concept of "Trespass" in determining whether the Fourth Amendment rights had been infringed upon. See also *Warden v Hayden*, 387 US 294; 87 S Ct 1642; 18 L Ed 2d 782 (1967).

The policy of providing a fair trial with accurate evidence should be a priority of penultimate status to this Court. The State should not be forced to depend upon the frailties of memory with the presence of an accurate tape. In this case, Drielick asserted he was on drugs; this tape would also be important to him since it gave the jury the opportunity to compare how he sounded on the stand and how he responded to Nancy McNeil's questioning. In the absence of any privilege, the reliance on an "intimate relationship" to prevent accurate testimony cannot wash. These policy considerations are bolstered by the statutory provisions of this State, as well as the federal rulings which allow such evidence when one party consents.

The State Legislature has provided a statutory framework to protect the privacy of the citizen, on the one hand, while, on the other hand, insuring the police the ability to investigate within the statutory framework:

§28.807(3) Using device to eavesdrop upon conversation.) Sec. 539c. Any person who is present or who is not present during a private conversation and who wilfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is

guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than \$2,000.00, or both. (CL '48, §750.539c).

§28.807(7) Acts not prohibited.) Sec. 539g. This act shall not be construed to prohibit:

(a) Eavesdropping or surveillance not otherwise prohibited by law by a peace officer or his agent of this state or federal government while in the performance of his duties.

§28.807(8) Civil remedies.) Sec. 539h. Any parties to any conversation upon which eavesdropping is practiced contrary to this act shall be entitled to the following civil remedies:

(a) An injunction by a court of record prohibiting further eavesdropping.

(b) All actual damages against the person who eavesdrops.

(c) Punitive damages determined by the court or by a jury. (CL '48, §750.539h.)

Of no small importance is the fact that there is no exclusionary policy which the State attached to a violation of the statute, but rather created civil liability in its stead. See generally Annot 25 ALR Fed 759 (1975). Since the statutory provisions do not call into play the sanctions of the exclusionary rule, the relief sought by Appellant-defendant is improper. *People v Burdo*, 56 Mich App 48 (1974). The Court of Appeals in *People v Livingston*, 64 Mich App 247, 255 (1975) adopted this stance.

SUMMARY AND RELIEF SOUGHT

WHEREFORE, the People pray that this Honorable Court deny the Petition for a Writ of Certiorari as filed by Defendant Drielick.

Respectfully submitted,

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Dated this 23rd day of December A.D., 1977.

A P P E N D I X

EXCERPTS FROM TRANSCRIPT

(387)

. . .

(Telephone ringing sound).

MALE VOICE: Hello.

FEMALE VOICE: Is Mike there?

MALE VOICE: This is Mike.

FEMALE VOICE: What's the matter with you?

MALE VOICE: You'll never believe.

FEMALE VOICE: What did you do?

MALE VOICE: What?

FEMALE VOICE: What did you do?

MALE VOICE: What do you care?

FEMALE VOICE: What do I care? Oh, I don't know.

What's going on? Aren't you going to talk to me?

MALE VOICE: Huh?

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FEMALE VOICE: Aren't you going to talk to me?

MALE VOICE: Yes, I'm talking to you.

FEMALE VOICE: What's the matter?

MALE VOICE: Nothing.

FEMALE VOICE: Something is.

MALE VOICE: No.

FEMALE VOICE: Are you sleeping?

MALE VOICE: No.

FEMALE VOICE: What did you do?

MALE VOICE: Huh?

FEMALE VOICE: Did you take something?

MALE VOICE: No.

FEMALE VOICE: What the hell the matter with you?

MALE VOICE: Nothing.

Excerpts from Recorded Telephone Conversation

FEMALE VOICE: Something is. I thought I'd you know, call you up and tell you there was a guy that followed me home in a yellow and black car, do you know him?

MALE VOICE: In a yellow car?

FEMALE VOICE: Uh huh.

MALE VOICE: No.

FEMALE VOICE: Oh, what did you say?

MALE VOICE: Nothing.

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FEMALE VOICE: Huh? What did you say?

MALE VOICE: Nothing.

FEMALE VOICE: What in the hell are you on?

MALE VOICE: Nothing.

FEMALE VOICE: You are too. You're lying to me.

MALE VOICE: No, I'm not.

FEMALE VOICE: Yes, you are. Are you laying there bleeding to death, huh? What did you do, slash your wrists?

MALE VOICE: No.

FEMALE VOICE: What?

MALE VOICE: No, I didn't, I didn't slash my wrists.

Hold on, got to get a light.

(Short pause).

FEMALE VOICE: Remember that night that you talked about why you killed Dan?

MALE VOICE: Yeah.

FEMALE VOICE: Mike, did you really kill him?

MALE VOICE: I don't think I did.

FEMALE VOICE: Then how come you told me (390) you did, huh?

MALE VOICE: Nancy, now listen to me for a minute.

FEMALE VOICE: Yes.

MALE VOICE: The way it happened — now listen to what I'm telling you. Whatever has sprung, sprang,

Excerpts from Recorded Telephone Conversation

sprung, whatever I'm telling you, what has sprung, sprang out of this, does it make a difference? Put it all together.

FEMALE VOICE: Did you do it really?

MALE VOICE: Does it make a difference to you?

FEMALE VOICE: Yes, it does, huh?

MALE VOICE: You want that answer, don't you?

FEMALE VOICE: Yes, I'm scared, I want the answer.

MALE VOICE: What are you scared of?

FEMALE VOICE: Because — I don't know. I'm just scared. That guy followed me home tonight and I just got scared and I want to know did you —

MALE VOICE: It was you who made that phone call wasn't it?

FEMALE VOICE: Yes, yes, I made the call to the police because some guy followed me home, yes. (391) Don't you know who he was, just a yellow and black car, I don't know him.

MALE VOICE: Yellow and black? Don't get upset, Honey.

FEMALE VOICE: All right, Mike. Did you — did you kill Danny?

MALE VOICE: Don't get upset, don't worry about anything.

FEMALE VOICE: I'm scared.

MALE VOICE: Why?

FEMALE VOICE: They're going to find out?

MALE VOICE: No, they're not.

FEMALE VOICE: How?

MALE VOICE: Now listen to me, Nance.

FEMALE VOICE: Where's that gun then, that was underneath the stereo that night?

MALE VOICE: Don't worry about that.

FEMALE VOICE: I want to know, Mike.

MALE VOICE: It's gone.

Excerpts from Recorded Telephone Conversation

FEMALE VOICE: What did you do with it?

MALE VOICE: It's gone.

FEMALE VOICE: Does Pat know what you did with the gun?

MALE VOICE: Yes, he does, it's gone.

FEMALE VOICE: Listen, I'm scared.

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MALE VOICE: Nancy, Honey —

FEMALE VOICE: What?

MALE VOICE: Now, listen to me. There's nothing to be afraid of.

FEMALE VOICE: Did you kill Dan, can you tell me that? Ever since you told me that night, I don't know whether to believe you or not. Did you? Now, it does make a difference to me.

MALE VOICE: Do you want me to tell you?

FEMALE VOICE: Yes, I want you to tell me.

MALE VOICE: Yes, I did. Do you want a reason?

FEMALE VOICE: Yes.

MALE VOICE: Okay. I'll tell you the reason. I will not — and I'll love to the day I die. I will not — I will not have anybody threatening to kill you or Tammy.

FEMALE VOICE: But he didn't threaten to kill me or Tammy. He has never threatened to kill me or Tammy.

MALE VOICE: What did you tell me when your mother-in-law called?

FEMALE VOICE: That I was upset, she was upset.

MALE VOICE: I got different versions. I (393) got different versions from people that were sitting with him in a bar.

FEMALE VOICE: What bar?

MALE VOICE: Does it make a difference?

FEMALE VOICE: Yes, might as well tell it like it is.

Excerpts from Recorded Telephone Conversation

MALE VOICE: Okay. Let's see — I'll tell it like it is. He was in All Sports Tavern and he was spreading words around all over hell. He was going to wipe you out baby.

FEMALE VOICE: Well, I could have committed him before you killed him, you know. What did you do, follow him or what?

MALE VOICE: No, I didn't. Remember me telling you I was going to go out and try to salvage your mind in so many words, you know, try to find out where the hell he was and so on and so forth.

FEMALE VOICE: No.

MALE VOICE: I remember it — got to find an ashtray.

I'm back. Anyway, I'll tell you something, honey, right now, flat out, no ifs ands or buts about it. You have absolutely nothing to do with what happened, absolutely nothing, you understand me?

FEMALE VOICE: Yes, I understand that, (394) because I know I didn't.

MALE VOICE: And I think I know where to put you. Now, listen, I'll tell you —

FEMALE VOICE: The cops —

MALE VOICE: I'll tell you what I've been doing, now listen to me for a minute.

FEMALE VOICE: Okay.

MALE VOICE: Please? Okay.

FEMALE VOICE: Yes.

MALE VOICE: You know, between Friday and today I have taken a half of a bottle of them goddammed things because I don't even know where the hell I am or why.

FEMALE VOICE: What did you take?

MALE VOICE: Huh?

FEMALE VOICE: What did you take?

MALE VOICE: Never mind what I took, never mind.

Excerpts from Recorded Telephone Conversation

FEMALE VOICE: Can you just tell me how you found Dan?

MALE VOICE: What do you mean, how I found him?

FEMALE VOICE: To kill him.

MALE VOICE: Nancy, when I took off that day, I told you I was going looking, didn't I? I know I (395) told you that, dear. Now, listen to me for a minute will you please?

FEMALE VOICE: Yes.

MALE VOICE: I told you already there isn't nothing, no way, one way or the other to connect you with this. Do you believe me, sweetheart?

FEMALE VOICE: Yes.

MALE VOICE: Do you?

FEMALE VOICE: Yes.

MALE VOICE: I hope you do. I really, really hope you do. Because there's nothing going wrong. I mean if something does go bananas or some bullshit, don't worry about it because dig it, there's only one person.

FEMALE VOICE: What about the cops?

MALE VOICE: Only one person.

FEMALE VOICE: What person?

MALE VOICE: Me, and the only way anybody is going to get anything, and I'll tell you this for a fact because I know, — because a friend of mine is a detective at the Buena Burrupp so on and so forth. The Buena Vista detectives are — whatever the hell they are, right.

FEMALE VOICE: Right.

MALE VOICE: They are going to close it because they ain't got nothing. They haven't got (396) the time to waste on it.

Hang on a minute, got to find some cigarettes.

(Short pause).

FEMALE VOICE: The Buena Vista police —

Excerpts from Recorded Telephone Conversation

MALE VOICE: Don't worry about them, they're punks.

FEMALE VOICE: When you were questioned —

MALE VOICE: Yes?

FEMALE VOICE: — what impression did they give you?

MALE VOICE: What?

FEMALE VOICE: What impression did they give you?

MALE VOICE: I told you exactly what impression I got. Do you believe me or don't you?

FEMALE VOICE: I don't know.

MALE VOICE: No.

FEMALE VOICE: They're not stupid, you know that.

MALE VOICE: They're twice as dumb as a dime.

FEMALE VOICE: Well, what if something goes wrong and they found — find out, what about —

MALE VOICE: What could go wrong? I'll tell (397) you right now —

FEMALE VOICE: I'm scared.

MALE VOICE: Now, you listen to me for a minute.

FEMALE VOICE: Okay.

MALE VOICE: I'll tell you right now —

FEMALE VOICE: I'm scared, yes.

MALE VOICE: Now you shut up and listen to me for a minute.

FEMALE VOICE: Okay.

MALE VOICE: Before I went up to the car — before I — okay. I'm going to talk to you straight. Before I went up to the car I had a rag in my hand. I wiped it — the handle off. I had the gun down in my hand, I opened the door. That fucking thing was sitting there so I pulled the gun next to his head and I pulled the trigger. That's not really how it happened but the thing went off. Anyway, it's too late to do anything about it.

FEMALE VOICE: Yes, I know it.

Excerpts from Recorded Telephone Conversation

Well, listen, I'm going to go, okay, and you get some sleep and I'm going to get some too, okay?

MALE VOICE: Nance?

FEMALE VOICE: Yes?

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MALE VOICE: Will you talk to me for a little bit, please, because I'm — goddammit, you know what I was going to do tonight.

FEMALE VOICE: What?

MALE VOICE: Now, I wanted to talk to you, honey. I really did, because if I wouldn't have talked to you you would have never seen me again because there wouldn't have been nothing left. That's a fact, because I got the bottles sitting right here and that's what I was going to do when I come home.

FEMALE VOICE: Think it will solve anything?

MALE VOICE: What?

FEMALE VOICE: Think it will solve anything?

MALE VOICE: It will probably help you out quite a bit, plus there's a letter.

FEMALE VOICE: Okay.

MALE VOICE: Going to burn it now.

FEMALE VOICE: Well, okay. Well, listen I'm so tired and I don't feel good today so I'm going to hang up and I'll talk to you later, okay? I'm going to get some sleep and I want you to get some sleep now too. I want you to lay down and go to sleep, sleep it off. You'll feel better tomorrow, okay?

MALE VOICE: All right, do you love me? No?

FEMALE VOICE: Yes.

. . .